

Part III - Administrative, Procedural, and Miscellaneous

Biodiesel Tax Incentive; Cellulosic Biofuel Producer Credit

Notice 2008-110

SECTION 1. PURPOSE

This notice provides guidance on the changes to the biodiesel tax incentives (§§ 40A, 6426, and 6427(e) of the Internal Revenue Code) resulting from a revision to the requirements of the American Society of Testing and Materials standard D6751 (ASTM D6751). This notice also provides guidance on the cellulosic biofuel producer credit under section 40, which was added to the Code by the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-234) (the Food Act).

SECTION 2. BIODIESEL; ASTM STANDARD

(a) Overview. (1) Sections 40A, 6426, and 6427(e) of the Code provide tax incentives for the production, sale, and use of biodiesel and biodiesel mixtures. Section 40A(d)(1) defines biodiesel as monoalkyl esters of long chain fatty acids derived from plant or animal matter which meet--

(i) The registration requirements for fuels and fuel additives established by

the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C. 7545), and

(ii) The requirements of ASTM D6751.

(2) Section 6426(c)(4) of the Code disallows the biodiesel mixture credit of § 6426 unless the producer of the mixture obtains a certificate, in such form and manner as prescribed by the Secretary, from the producer of the biodiesel that identifies the product produced and the percentage of biodiesel and agri-biodiesel in the product. Section 40A(b)(4) provides a similar rule for the biodiesel mixture credit and biodiesel credit allowed by § 40A.

(3) Notice 2005-62, 2005-35 I.R.B. 443, provides a model certificate for this purpose. In completing this certificate, a biodiesel producer certifies, among other things, that the biodiesel it has produced and sold meets the requirements of ASTM D6751.

(4) The forms on which taxpayers claim the biodiesel incentives (Form 8864 (Biodiesel and Renewable Diesel Credit), Form 720 (Quarterly Federal Excise Tax Return), and Form 8849 (Claim for Refund of Excise Tax)) require the claimant to certify that the claim relates to biodiesel that meets the requirements of ASTM D6751.

(b) Revised Specification for Biodiesel; ASTM D6751. Effective on October 13, 2008, the American Society of Testing and Materials revised the requirements of ASTM D6751 by adding a cold soak filtration test for biodiesel (the October 13, 2008 revision).

(c) Transitional rule. If a claim relates to production, sale, or use of biodiesel or a biodiesel mixture and the production, sale, or use occurs before April 1, 2009, a

certification that the biodiesel covered by the claim meets the requirements of ASTM D6751 is valid if the biodiesel meets the requirements of ASTM D6751 as in effect either before or after the October 13, 2008, revision adding the cold soak filtration test for biodiesel. If a claim relates to production, sale, or use of biodiesel or a biodiesel mixture and the production, sale, or use occurs after April 1, 2009, a certification that the biodiesel covered by the claim meets the requirements of ASTM D6751 is valid only if the biodiesel satisfies the requirements of ASTM D6751 as in effect after the October 13, 2008, revision adding the cold soak filtration test for biodiesel.

SECTION 3. CELLULOSIC BIOFUEL PRODUCER CREDIT

(a) Overview. Section 15321 of the Food Act provides for a cellulosic biofuel producer credit under § 40 of the Code. The credit is allowed to a taxpayer for cellulosic biofuel that the taxpayer produces after December 31, 2008, and before January 1, 2013, and sells for use or uses for a purpose described in § 40(b)(6)(C).

(b) Definition. (1) Section 40(b)(6)(E) provides that cellulosic biofuel means any liquid fuel (other than low-proof alcohol) which--

(i) Is produced from any lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis, and

(ii) Meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C. 7545).

(2) For purposes of paragraph (b)(1) of this section, low-proof alcohol is any alcohol with a proof of less than 150. The determination of the proof of any alcohol shall be made without regard to any added denaturants.

(c) Registration--(1) In general. Section 40(b)(6)(G) of the Code provides that the cellulosic biofuel credit under § 40 is not allowed with respect to any taxpayer unless the taxpayer is registered with the Secretary as a producer of cellulosic biofuel under § 4101.

(2) Application for Registration. Taxpayers shall apply for registration as a producer of cellulosic biofuel on Form 637, *Application for Registration (For Certain Excise Tax Activities)*, in accordance with the instructions for that form. As provided in § 48.4101-1(a)(2) of the Manufacturers and Retailers Excise Tax Regulations, a person is registered under § 4101 only if the Service has issued a registration letter to the person.

(3) Requirements. The Service will register an applicant as a producer of cellulosic biofuel only if the Service--

(1) Determines that the applicant is a producer of cellulosic biofuel or is likely to become a producer of cellulosic biofuel within a reasonable time after being registered under § 4101; and

(2) Is satisfied with the filing, deposit, payment, reporting, and claim history for all federal taxes of the applicant and any related person (as defined in § 48.4101-1(b)(5)).

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is Jennifer C. Bernardini of the Office of the Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer C. Bernardini on (202) 622-3110 (not a toll-free call).